STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2001
v	No. 215822 Genesee Circuit Court
JAMES DUKES, JR., Defendant-Appellant.	LC No. 98-002150-FH

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury as charged of possession with intent to deliver less than fifty grams cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6), carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent prison terms of 96 to 360 months for the possession with intent to deliver cocaine conviction, 36 to 120 months each for the possession of a firearm by a felon and CCW convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right, raising several issues both through counsel and in propria persona. We affirm.

At trial, evidence was presented that defendant was one of four occupants in a car that was stopped by Flint police officers for having an obscured windshield and an improper license plate. Defendant was the right-rear passenger in the car. As the driver was being arrested for not having a driver's license, the other occupants were told to keep their hands in full view for the officers' safety. Twice, defendant "tucked" his hands between his legs and leaned forward toward the floor, then kicked with his foot several times in the direction of the front seat. It appeared to the officer that "he had something in his hand that he was dropping to the floor board or maybe picking up from the floor board." The passengers were instructed to get out of the car because the car was being impounded. As the officers proceeded to pat the passengers down in a protective search for weapons, defendant ran "about ten steps" before he was tackled by one of the officers. A .380 caliber handgun loaded with silver tip bullets was discovered under the front passenger seat. Although defendant denied it, the police testified that they found several live

.380 caliber silver tip bullets, three Motorola pagers and thirteen individually wrapped "rocks" of crack cocaine in defendant's possession.

Defendant argues on appeal that he was denied a fair trial because the prosecutor improperly elicited testimony from the officer-in-charge about defendant's silence during an interview. Michigan courts have repeatedly held that silence of an accused in the face of police questioning may not generally be used against the accused at trial, *People v Gallon*, 121 Mich App 183, 187; 328 NW2d 615 (1982), and we agree with the trial court that the prosecutor acted improperly here. The trial court, however, immediately gave a curative instruction which was sufficient to dispel any prejudice that resulted. Accordingly, reversal is not warranted. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant also argues that the trial court improperly allowed expert testimony regarding his intent to deliver drugs and his possession of the gun. The admission of evidence, the qualification of an expert, and the admissibility of expert testimony are all matters within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). It was not improper for the police expert to testify that it was clear from the selling price, quantity and packaging of crack cocaine that defendant intended to sell the drugs. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). The fact that the testimony embraced the ultimate issue of intent to deliver did not render the evidence inadmissible. *Id*. While we agree that the expert's belief that defendant possessed the gun was inappropriate, it is not "more probable than not" that the tainted evidence was "outcome determinative." *People v Lukity*, 460 Mich 484, 494-496; 596 NW2d 607 (1999).

Nor are we convinced that defendant was denied a fair trial because the prosecutor "disparaged" defense counsel during closing argument. Even assuming arguendo that the prosecutor's unobjected remarks were improper, a curative instruction would have eliminated any undue prejudice. Defendant's substantial rights were not affected and reversal is not required. *Carines, supra*.

Defendant next contends that counsel was ineffective. There is no merit to this claim. Defendant's claims of ineffective assistance here involve the questions counsel asked and the questions and comments counsel chose not to object to. Because defendant did not request a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). The burden is on defendant to show that counsel made serious errors that prejudiced the defense and deprived defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Here, defendant has not overcome the strong presumption that counsel's conduct was reasonable, and this Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *Id*.; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Nor are we convinced that defendant was denied an impartial jury. Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court. *People v*

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Hubbard (After Remand), 217 Mich App 459, 472; 552 NW2d 493 (1996). To determine whether a prima facie violation of the fair-cross-section requirement of the US Const, Am VI, has occurred, the court must find: "(1) the group alleged to be excluded must be a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury-selection process." *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000). In this case, defendant has established the first prong: African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. *Hubbard*, *supra*. Defendant has not, however, established that African-Americans were underrepresented in jury venires in general, only in his particular array. One case of alleged underrepresentation does not establish a prima facie case. *Williams*, *supra*. Nor is there any evidence here of systematic exclusion. Neither "one or two incidents of a particular venire being disproportionate" nor "a 'bald assertion' that systematic exclusion must have occurred" is enough to create a prima facie showing. *Id*., quoting *People v Flowers*, 222 Mich App 732, 736-737; 565 NW2d 12 (1997).

Defendant also argues in propria persona that there was insufficient evidence to support his convictions on the weapons charges. This Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *Carines*, *supra*. The reasonable inferences from the evidence presented here are more than ample to support defendant's convictions.

Defendant also suggests that the trial court erred in instructing the jury that he was a convicted felon. The instruction was given by stipulation of the parties, to prevent introduction of specific information about defendant's previous convictions, which included assault with a dangerous weapon, armed robbery, and first-degree criminal sexual conduct. A party cannot request a certain action of the trial court and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Next, defendant raises a challenge in propria persona to the jury instructions. This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). An instruction that is not supported by the evidence should not be given. *Id*. "Jury instructions must include all the elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id*. If the charge as a whole covers the substance of the omitted instruction, error does not result. *Id*.

Here, the trial court properly denied defendant's request for CJI2d 8.5, which instructs that mere presence is insufficient to prove that a defendant assisted in committing a crime. The requested instruction was not supported by the evidence, and the trial court did instruct on defendant's claim that he did not know the weapon was in the car and took no part in carrying or keeping the gun.

Defendant also argues that, although not requested, the trial court should have given the commentary to CJI2d 12.5, defining possession of a controlled substance. The commentary involves the distinction between actual and constructive possession. There was no issue about constructive possession of the drugs here and the instruction was not supported by the evidence. Because there is no merit to defendant's claim that the jury was improperly instructed, defense counsel was not ineffective for failing to raise the issue below. Counsel is not required to raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Nor is there any merit to defendant's other claims of ineffective assistance of counsel, raised in propria persona. Decisions about what questions to ask and which witnesses to call are matters of trial strategy that this court will not second-guess. *Avant*, *supra*; *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant's challenge to the trial court's determination of a witness' competency for her own sentencing in another case is not an appropriate subject for review here. Moreover, counsel was aware that he could call the witness and, based on his investigation, chose not to do so. The record does not support defendant's claim that his witnesses were not properly investigated.

Finally, there is no merit to defendant's claim in propria persona that the trial court lacked subject matter jurisdiction over his case. The district court's finding of probable cause in this case was justified by the record. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot